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No. 98-512

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANITA DAVIS, REV. LEE HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS and KIM T. LYLES,
Petitioners,

v.

LAWTON CHILES, SANDRA MORTHAM, and DAVID RANCOURT,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Restated)

1. Whether the degree of evidence of racial bloc voting in this case, coupled with the profound adverse constitutional and statutory alterations to Florida's method of selecting trial judges required by petitioners' proffered remedies under Section 2 of the Voting Rights Act, outweigh Florida's strong interest in maintaining its current system?

2. Whether the Eleventh Circuit's holding here, which is consistent with its previous holdings, and in harmony with prior and subsequent decisions of other courts on this same subject, nevertheless conflicts with *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991)?

3. Whether, as a result of the Eleventh Circuit's decision, there remain unresolved issues of national importance regarding the appropriate standards for evaluating a Section 2 vote dilution challenge to at-large elections for state trial judges?

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Respondents' Brief in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

Petitioners have correctly identified the opinions below.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Respondents generally accept petitioners' statement of the case for jurisdictional purposes only, subject to the following. First, as the Eleventh Circuit found, a black judge appointed to the bench was reelected without opposition, and a black lawyer recently defeated a white candidate for judge in Leon County, Florida. App. 3a-4a. Second, although the Eleventh Circuit avers that no black judges have been appointed to the Leon County Court, App. 6a, fn. 6, a black lawyer has been appointed to the county bench. See certificate of appointment, App. 1a, accompanying this brief. Thus, at present, of the 15 judgeships in the affected jurisdictions, App. 105a, three are filled by African-Americans. Third, although the lower courts discounted the effect of incumbency, the Eleventh Circuit's reference to a specific 1992 election, App. 4a, fails to address the fact that the successful white candidate was a multi-term incumbent. App. 49a. Fourth, in conducting the required totality of the circumstances analysis as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court concluded that the only basis for finding vote dilution was the socio-economic effects of past discrimination, and that finding is based on a black-white voter registration differential of 3% in the judicial circuit and 5% in the county (with blacks registering at the lower percentages), from which the court presumed a hindrance of blacks' opportunity to participate in the electoral process and elect candidates of choice. App. 127a-129a.

With specific regard to petitioners' efforts to meet *Gingles'* totality of the circumstances requirement, the district court found--and petitioners do not dispute--the following:

(1) There are no present effects of past racial discrimination, as blacks have no difficulty registering, voting or participating in judicial elections. App. 125a.

(2) The size of the election district does not lessen voting and election opportunities for blacks. App. 130a.

(3) The majority vote requirement was not adopted for a discriminatory purpose or to lessen voting and election opportunities for blacks. App. 132a-133a

(4) The use of a numbered place system, staggered terms and judicial candidate filing fees do not lessen voting and election opportunities for blacks. App. 134a-135a.

(5) There is no candidate slating process. App. 135a.

(6) There are no racial appeals in campaigns; if there were any, they would "likely create a backlash among both blacks and whites. . ." App. 136a.

(7) There is no lack of community responsiveness to the needs of the black community. App. 137a.

PRELIMINARY STATEMENT

In that this Court reviews judgments, and not statements in opinions, *California v. Rooney*, 483 U.S. 307 (1987), it is not necessary at this time to address two legal errors implicating the findings of fact: (1) the Eleventh Circuit's reweighing of the evidence, albeit in dicta, App. 22a-28a, see *Banco Industrial de Venezuela, C.A. v. Credit Suisse*, 99 F.3d 1045, 1049 (11th Cir. 1996) ("we cannot reweigh the evidence and credibility and reach our own factual conclusions about culpability."); and (2) the district court did not conduct the required "intensely local appraisal of the design and impact" of the subject judicial selection system, *Gingles*, 478 U.S. at 79, through "a searching practical evaluation of the 'past and present reality' of that system's

operation, *Gingles*, 478 U.S. at 79. This in turn requires a functional view of the political process, id., the purpose of which is to show that the challenged electoral practice "interacts with social and historical conditions to cause an inequality," *Gingles*, 478 U.S. at 47, that "impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). The district and circuit courts' primary reliance on vote totals, as demonstrated by the decisions accompanying the petition for writ of certiorari, does not comport with this analytical standard.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's decision continues that Court's view first expressed in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. (1994)(en banc), *cert. denied*, 514 U.S. 1083 (1995), that Florida's interest in maintaining its method of selecting trial judges is sufficiently strong so as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have been shown below. Moreover, that particularized evidence does not amount to gross racial vote dilution which is necessary for a court to consider imposing as a remedy profound constitutional and statutory alterations to Florida's trial judge selection system. Petitioners' arguments are not new; several circuit courts have consistently rejected the type of claims petitioners assert here, and this Court has just as consistently denied certiorari in those cases. Accordingly, there is neither decisional conflict nor any unresolved issue of national importance for evaluating a Section 2 vote dilution challenge to at-large elections for state judges.

I. THE ELEVENTH CIRCUIT'S LATEST DECISION ON THE SUBJECT OF SECTION 2 REMEDIES IN JUDICIAL ELECTION LITIGATION IS CONSISTENT WITH DECISIONS FROM OTHER CIRCUITS IN REJECTING THE ARGUMENT THAT PROFOUND CONSTITUTIONAL AND STATUTORY ALTERATIONS OF A STATE'S TRIAL JUDGE SELECTION SYSTEM ARE ALWAYS JUSTIFIED REGARDLESS OF THE DEGREE OF EVIDENCE OF RACIALLY POLARIZED VOTING.

As in *Nipper v. Smith, supra*, petitioners proceed upon an erroneous view that a State's interest in its judicial system operates as an absolute bar to a Section 2 vote dilution claim, regardless of the degree or extent of vote dilution shown in a particular case. Section 2 jurisprudence since *Nipper* amply and unwaveringly demonstrates that petitioners' argument flows from a fundamentally flawed foundation.

The argument's fatal flaw is in its presumption that once vote dilution is shown, regardless of its degree, petitioners are automatically entitled to a remedy that includes substantial alteration of the structure of a State's judiciary necessitating a re-write of its constitution and statutes. As demonstrated below, Section 2 judicial election jurisprudence categorically rejects petitioners' argument.

The most recent demonstration of petitioners' flawed foundation is found in *Cousin v. Sundquist*, 145 F.3d 818, 822 (6th Cir. 1998). In that case, the court considered Section 2 proposed remedies of single-member judicial districts within a single county, and cumulative voting, weighed against the particularized evidence of vote dilution. In rejecting these proposals, the court found that they (1) violated "Tennessee's important and substantial linkage interest (,)" (2) were designed to achiev(e) proportional representation.. ., a purpose for which Section 2 of the Voting Rights Act was not intended, and . . .(with regard to cumulative voting, was) a particularly inappropriate remedy when applied to the election of state court judges."

Of profound significance for the purpose of the case *sub judice*, that court said:

> Our treatment of the issues is consistent with the latest opinions from other Courts of Appeals dealing with Voting Rights Act challenges to the conduct of judicial elections. See *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir. 1997)(involving a challenge to the election of circuit court and state appellate court judges in Milwaukee County), *cert denied*, --- U.S.--- 118 S.Ct. 853, 139 L.Ed 2d 753 (1998); *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996)(involving a challenge to the method of electing judges to Alabama's civil and criminal appellate courts); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994)(en banc)(involving a challenge to Florida's method of electing judges to the state's Fourth Judicial Circuit); *LULAC*, 999 F.2d 831

(involving a challenge to Texas' system of electing state court judges)(,){*cert. denied,* 510 U.S. 1071 (1994)}.

Id.

(To this list of cases, that court could just as well have added *Southern Christian Leadership Conference (SCLC) v. Sessions*, 56 F.3d 1281 (11th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 1045 (1996)(suggestions to reconfigure judicial circuits to create black majorities or subdistrict circuits and counties were not feasible remedies.)[1]

The above narrative demonstrates that, despite petitioners' claim of conflict and that the decisions below are an anomaly, in fact Section 2 judicial election jurisprudence is consistent and uniform in rejecting the arguments petitioners assert here. In sum, petitioners' claims here argue for a departure from Section 2 jurisprudence as demonstrated by the cases noted above.

On the subject of cumulative voting, the *Cousin* court said:

(O)ur research has revealed only one federal case that has ordered cumulative voting in any electoral context, and that in a case where the plaintiffs challenged the selection of a county legislature, *Cane v. Worcester County, Maryland*, 847 F.Supp. 369 (D.Md. 1994), *aff'd in part and rev'd in part*, 35 F.3d 921, 928 (4th Cir. 1994) (reversing the district court's imposition of cumulative voting because the district court did not

[1] It is noted that this Court denied certiorari in four of these cases: *LULAC, Nipper, Milwaukee Branch of the N.A.A.C.P.*, and *Southern Christian Leadership Conference.*

> cumulative voting because the district court did not adequately "give effect to the legislative policy judgments underlying the current legislative scheme"). We find it significant that the Fourth Circuit reversed the district court's imposition of cumulative voting in *Cane*, leaving us with no example in federal case law in which cumulative voting has been ordered and approved for elections to any office. Neither are we aware of any jurisdiction that has elected state trial judges by means of cumulative voting.

Id.

The *Cousin* decision is further instructive in its handling of the *Gingles*' totality of the circumstances analysis because, just as is the case here, the Sixth Circuit found that only the effects of past discrimination--"the fifth 'typical' Senate factor"--weighed "clearly in favor of a finding of vote dilution" 145 F.3d at 834. The court concluded, however, that notwithstanding that finding, "the district court's application of the totality of the circumstances test was clearly erroneous. . .(pointing out that) this one factor, in combination with the others, does not outweigh the significant linkage interest Tennessee has in electing" trial judges. *Id.* The *Cousin* court therefore conducted a balancing test, weighing the degree of racial polarized voting with the strong State interest in maintaining its judicial structure, and concluded that the degree of evidence was not sufficient to overcome the State's interest.

Cousin therefore is virtually identical to the case *sub judice* in that the only totality factor supportive of petitioners' Section 2 claim below was not enough to allow either the district or circuit

court to overcome Florida's strong interest in preserving its judicial structure.

This required balancing of the degree of racially polarized voting and the State's interest in its existing judicial structure is more clearly shown in one of the cases cited in *Cousin* and presented to this Court for certiorari review, *Milwaukee Branch of the N.A.A.C.P., supra*. In that case, the court lays to rest petitioners' argument here--as well as the Eleventh Circuit's concern--that a State's interest in its judicial system operates as an absolute bar to remediating a Section 2 violation:

> *Houston Lawyers' Ass'n*, 501 U.S. at 427, 111 S.Ct. at 2381, tells us that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member [judicial] offices ... does not automatically, and in every case, outweigh proof of racial vote dilution." (The district court judge) did not treat this interest as "automatically" outweighing proof of vote dilution; he said no more than that the interest is weighty. In asking us to hold that this was error, plaintiffs really want us to say that the only proper weight is zero (or, if not nil, so low that it can never tip the balance). Such a conclusion would put us in conflict with en banc decisions of the fifth and eleventh circuits, which hold that this consideration is powerful, indeed **dispositive unless the plaintiffs show gross racial vote dilution**. *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 (5th Cir. 1993)(en banc) (*LULAC*); SCLC, 56 F.3d at 1294-

> 95; *Nipper*, 39 F.3d at 1543; accord, *Cousin v. McWherter*, 46 F.3d at 568, 577 (6th Cir. 1995). (Emphasis added.)

116 F.3d at 1200.

This language clearly rejects petitioners' view--and allays the Eleventh Circuit panel's concern--that a State's interest in its judicial structure automatically outweighs whatever evidence of racially polarized voting may be shown, and also demonstrates that *Houston Lawyers', LULAC* and *Nipper* are consistent with the decisions below. Section 2 judicial election jurisprudence clearly establishes that the degree of actionable racially polarized voting must be balanced and weighed against the State's strong interest in preserving its judicial structure. In the case at bar, petitioners simply did not meet the evidentiary burden necessary to pursue entitlement to the drastic relief they seek.

Therefore, contrary to petitioners' contention, there is no doubt that a Section 2 remedy exists in a judicial election setting, even as against the State's strong interest in maintaining an at-large, district-wide electoral system, but only if and when there is a showing of "gross racial vote dilution." This view is founded upon *Thornburg v. Gingles*, 478 U.S. at 56, which establishes that the existence of racial bloc voting must reach a certain level; that is, it must be "legally sufficient." This legal sufficiency is determined on a sliding scale, based on the district and a host of relevant particularized fact-based circumstances. *Id.*

Against this backdrop, the Eleventh Circuit in the case at bar in actuality correctly concluded that the evidence of vote dilution was not demonstrative of the required gross racial vote dilution necessary to overcome the State's weighty interest in its judicial structure. This evidentiary requirement of "gross racial vote dilution" shows that the Eleventh Circuit's concern, echoed by petitioners, that Section 2 "cannot be said to apply, in any meaningful way, to at-large judicial elections(,)" App 21a, is a misapprehension.

The facts set out in the Statement of the Case above reveal that petitioners' efforts here to impose on the State the proffered remedial scheme is based on the most tenuous of reasons for finding actionable vote dilution. In essence, the district court's factfinding, premised on a presumption of the effects of past discrimination based on a small percentage differential of black-white voter registration, and both the district court's and Eleventh Circuit's refusal to find gross racial vote dilution from the evidence presented by petitioners, demonstrate that the decisions below are correct and wholly consistent with post-*Houston Lawyers'* Section 2 jurisprudence.

The cases cited herein reveal that there may well be Section 2 judicial election cases in which racially polarized voting is so severe, pervasive and persistent as to justify casting aside a State's strong interest in its judicial system in favor of some type of remedy, perhaps even one from the several types of far-reaching, egregious constitutional and statutory alterations to a State's judiciary as petitioners proffer here by way of sub-districts, cumulative voting and limited voting. However, as the decision of the district court demonstrates, App. 29a-83a, 103a-140a, no such finding was, or could have been, made here.

The Eleventh Circuit left no doubt as to the profound and fundamental adverse impact of petitioners' proposed Section 2 remedies. The court, after noting that petitioners did not "contest any of these constitutional problems under Florida law," App. 11a, found the following flaws:

> First, Davis's plan would require changes to Article V, Section 10 of the Florida Constitution, which directs that circuit and county judges be elected "by a vote of the qualified electors within the territorial jurisdiction of their respective courts." Fla. Const. art. V § 10.Under Florida law, there is a difference between an"election," which allows for competing candidates, and a "retention" vote for judicial office, which does not. See Fla. Stat. § 105.011(2)(distinguishing between an "election" and a "retention" in defining a "judicial office"). Although Davis's plan would permit citizens residing outside a subdistrict to vote in retentions, it would deny them the right to take part in the "elections," in contravention of Florida's provision that they can participate in both. See Fla. Stat. § § 105.061, 105.051.
>
> Second, the retention language of Article V, Section 10 includes only justices of the Florida Supreme Court or judges of a district court of appeal, as do Florida's statutes. See Fla. Const. art. V § 10(a); Fla. Stat. § § 105.051(2), 105.061. Accordingly, there is no constitutional or statutory basis in Florida law for the retention system Davis

> proposes; as the district court observed, Florida's Constitution and statutes would have to change to allow for Davis's proposed move from jurisdiction-wide, competitive elections to competitive, subdistrict elections followed by jurisdiction-wide retentions.
>
> Third, Article V, Section 9 of the Florida Constitution provides that either the Supreme Court of Florida or the Florida legislature shall define the territories of Florida's judicial circuits. See Fla. Const. art. V § 9. If a court were to require Florida to accept one of the subdistrict design plans contained in Davis's subdistricting proposal, it would, by necessity, contravene this provision.

App. 11a-12a.

It is against this backdrop that the Eleventh Circuit considered the strength and profound weight that must be accorded Florida's judicial structure. As the court said:

> Territorial linkage between a trial judge's jurisdiction and electoral base serve Florida's interest in judicial accountability. See *SCLC*, 56 F.3d at 1296-97; *Nipper*, 39 F.3d at 1543-45 (plurality opinion). Were a judge to be answerable to an electorate smaller than his jurisdiction, the judge would have an incentive, however unethical, to engage in "home cooking," favoring litigants from his election district over others. See *SCLC*,

> 56 F.3d at 1297. Thus, as the Supreme Court has observed, "the State's interest in maintaining. . . the link between a district judge's jurisdiction and the area of residency of his or her voters. . . is a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a § 2 violation has occurred." *Houston Lawyers'*, 501 U.S. at 426, 111 S.Ct. at 2381. When, as in this case, there is no evidence that a state is administering its judicial election system in a racially discriminatory manner, the state's interest in preserving linkage between judges' jurisdiction and electoral bases is even weightier. See *Nipper*, 39 F.3d at 1544 (plurality opinion). Moreover, we have suggested that Florida has an interest in avoiding even the appearance that its judges may harbor "home cooking" biases. *See id.*

App. 15a.

From this, the Eleventh Circuit concluded that Florida's asserted interest is strong and that the "proposed remedy would substantially break Florida's linkage between its judges' jurisdictions and electoral bases(,)" adding that

> we agree with the district court that imposition of Davis's plan "would be akin to compelling the state to disenfranchise every voter residing in the two jurisdictions, but outside the subdistrict." *See id.* at 44. Second, precedent requires us to recognize the risk that judges under Davis's proposal would prove unaccountable to many

voters even within their subdistricts because of continued racial bloc voting:

> [I]n the judge's own subdistrict, voters would be disenfranchised: In white subdistricts the voting power of blacks would be diluted; in black subdistricts the voting power of whites would be diluted. The likely effects of the loss of minority influence would be more pronounced in this context of a lone decision maker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction.

App. 16a-17a.

To overcome the Eleventh Circuit's view of Florida's strong interest in its judicial structure, coupled with the profound adverse impact of petitioners' proposed remedies on that structure, the district and appeals courts would have had to find gross racially polarized voting of such a severe and pervasive nature as to justify setting aside the State's strong interest and imposing one of the petitioners' draconian remedies. That the Eleventh Circuit did not make such a finding--nor could it from the evidence

presented at the district court level--demonstrates the obvious: petitioners simply failed to meet their evidentiary burden.

Petitioner's argument contravenes and contradicts the consistent, unbroken jurisprudential chain manifested by the cases set out in this brief. These cases, and this Court's disposition of some of them, leave no room for doubt as to what is required to make out a Section 2 judicial election vote dilution claim. Petitioner is required to (1) present overwhelming evidence of gross racially polarized voting, and thereby (2) overcome the State's strong interest in maintaining its judicial structure, and (3) thereafter propose a truly remedial plan that specifically addresses the gross vote dilution, and does so in a manner that does not unduly and unreasonably trample upon a State's judicial model. Petitioners' case simply does not meet the requisite evidentiary standard so as to justify their pervasive structure-altering remedies as against the State's strong interest in preserving its judicial structure.

II. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOUSTON LAWYERS' ASSOCIATION v. ATTORNEY GENERAL OF TEXAS*, 501 U.S. 419 (1991) OR THE FIFTH CIRCUIT'S DECISION IN WHICH THIS COURT DENIED CERTIORARI.

The cases cited in Point I above from the Fifth, Sixth, Seventh and Eleventh Circuits demonstrate clarity and consistency as to what is required to prove a Section 2 judicial election vote dilution claim, and serve to refute petitioners' claim of decisional conflict with *Houston Lawyers' Association* and *LULAC, supra*. In fact, in their entire petition, petitioners fail to present one post-

Houston Lawyers' case that manifests decisional conflict with those discussed in Point I, or discuss one case decided since *Houston Lawyers'* in which a court has imposed any of their proposed remedies where the degree of evidence of racially polarized voting was at the same level petitioners presented below.

Petitioners' claim of decisional conflict with *Houston Lawyers'* and *LULAC* rings hollow in light of the fact that *Cousin v. Sunquist, supra*, discussed in Point I above---which petitioners intimate is in lockstep with the case *sub judice*, pet. pg. 22, fn. 11 ---draws its support and rationale from *Houston Lawyers'* and *LULAC*, as well as the other cases referenced in the Sixth Circuit's decision.

Since *Cousin* is predicated upon those cases petitioners rely on for conflict, and the case at bar is virtually identical to *Cousin* in those critical areas of degree of evidence, burden of proof and strength of judicial structure, it follows that this case also draws its support from the very cases on which petitioners rely for their conflict argument. Therefore, the case at bar cannot be in conflict with cases that ultimately support the rationale for the decisions below.

Of equal import is that neither *Houston Lawyers'* nor *LULAC* holds that a State's interest in preserving its judiciary always outweighs evidence of vote dilution. In fact, no case so holds, including the case at bar. Rather, these two seminal cases stand for the proposition, reiterated in the others noted above in Point I, that when a petitioner seeks one of the most profound acts that can be taken by a court, the jettisoning of an existing State judicial structure based on a federal statutory claim, the degree of evidence required--gross racial vote dilution--must be as

substantive, substantial and profound as to compel a court to conclude without reservation that the stark consequences of the remedy sought are justified as a matter of law.

In short, a Section 2 judicial election vote dilution case is made when a court weighs the evidence against the State's strong interest in preserving its judiciary, and finds that the evidence is so profound as to unalterably demonstrate the existence of gross vote dilution, which thereby justifies the upheaval in a State's judicial model born of a petitioner's proposed remedy, recognizing that that remedy must do no more than correct the gross vote dilution.

From this perspective, petitioners simply did not meet their evidentiary burden so as to justify imposing, as a remedy, a system under which, for example, a candidate for judicial office would not even be able to vote for himself or herself, nor would family members and neighborhood friends. App. 72a, fn. 39. Such a proffered system, which the courts below agreed would result in voter disenfranchisement, was properly weighed by the courts as against petitioners' vote dilution evidence, wherein the courts found only Senate Factor Five of *Gingles'* totality factors--the effects of past discrimination--as militating in favor of petitioners here, in reaching the conclusions set out in their decisions.

The evidentiary burden imposed on a petitioner in a section 2 judicial election case is indeed a heavy one; but litigation that calls for the type of profound constitutional and statutory re-write that petitioners seek here requires nothing less.

III. SECTION 2 JURISPRUDENCE PERTAINING TO JUDICIAL ELECTIONS DEMONSTRATES THAT THERE ARE NO UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE.

The uniformity and consistency of post-*Houston Lawyers'* and post-*Nipper* jurisprudence, in addition to vitiating any claim of decisional conflict, also demonstrate that there are no unresolved issues of national importance. The relative weight of the State's interest in maintaining its judiciary has been considered in several cases. (Specifically, Florida's strong interest in its judiciary has already been before this Court in *Nipper*.) That weight was and is a matter of profound consideration that was, and will continue to be, legitimately balanced against the degree of racially polarized voting, recognizing at all times that only a showing of gross racially polarized voting will allow a court to consider outweighing the State's asserted interest in its judiciary. Neither the circuit nor district court found gross racial vote polarization justifying the profound constitutional and statutory changes, and their concomitant consequences, born of petitioners' proffered remedies here. In short, the lower courts found that the remedies are not remedial at all; that the particularized facts of this case did not support a judicial re-write of several of the State's constitutional and statutory provisions governing its judiciary and the dire consequences flowing from it.

Stated succinctly, Section 2 judicial election jurisprudence now unmistakably requires that the degree of evidence of gross racially polarized voting must be at least as profound as the gravity and consequences of the remedy sought and imposed in order to establish a Voting Rights Act violation.

From the above, the is no reason for this Court to accept petitioners' invitation to visit this case, and in so doing, in effect revisit those cases discussed in Point I above. Petitioners' attempt to treat the Eleventh Circuit panel's decision as a jurisprudential anomaly fails in light of the above analysis of Section 2 judicial election cases. Petitioner can take comfort from current jurisprudence that there may well be cases justifying what they seek here. This case, however, is not one of them.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

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Assistant Attorney General
Counsel of Record
Florida Bar No. 129967

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STATE OF FLORIDA
DEPARTMENT OF STATE

Division of Elections

I, Sandra B. Mortham, Secretary of State,
do hereby certify that

Augustus Davis Aikens, Jr.

was duly appointed

Judge of the County Court,
Leon County, Group Four

for a term beginning on the

Sixth day of January, A.D., 1998,

until the First day of January, A.D., 2001

as shown by the records of this office.

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the Second day of October, A.D., 1998.

Sandra B. Mortham

Secretary of State

DSDE 99 (5-97)